

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1032 OF 2005

Mahipati Ganapati Warang & ors. ... Appellants

V/s

Shri Bandu @ Kondiba Sawaji Warang
(since deceased, by his legal heirs)
Smt. Harnabai Kondiba Warang & ors. ... Respondents

Mr. V.B. Rajure for the appellants.

Mr. Amit B. Borkar for the respondents 1A, 1B, and 2
to 4.

CORAM: P.V. KAKADE, J.

DATED: 13TH SEPT., 2005

P.C.:

1. The appellants have preferred this appeal against the judgment and order passed by the Addl. District Judge, Kolhapur dated 12.7.2005 dismissing the appeal and confirming the judgment and order passed by the Civil Judge, J.D., Malkapur, dated 1.3.2000 dismissing the suit for perpetual injunction simplicitor.

2. I have heard the learned counsel for both parties. Perused the record.

3. The suit was filed by the plaintiffs for perpetual injunction on the ground that defendant had obstructed plaintiffs' exclusive possession in the suit property including land of Gat No.117.

The defendant contested the suit on various grounds and sought dismissal of the suit.

4. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs failed to prove that they were in exclusive possession of the suit property. On the other hand, it was held that defendant had succeeded in proving that he was in possession of 1/2 share of the suit property and, as such the suit came to be dismissed.

The appeal was carried to the District Court, Malkapur. The learned Addl. District Judge, after hearing both sides, came to the conclusion that the findings recorded by the learned Trial Judge were legal and proper and dismissed the appeal. Hence the present appeal.

5. At the outset, it may be noted that there is no substantial question of law involved in this appeal. The learned counsel for the appellant vehemently urged

that the reasoning adopted by both the Courts below were perverse in the sense that they have not properly appreciated the entire evidence on record and thereby committed miscarriage of justice. In this regard, it must be noted that it was the case of the defendant that there were partitions 30 years ago and both the Courts below have accepted the theory and evidence of the defendant that earlier partitions were effected. The learned counsel for the appellants thereafter submitted that the lower appellate Court has wrongly interpreted the so-called admissions given by the plaintiffs' witness in the course of his cross-examination to the effect that the house property of the defendant was in the land of Gat No.117 i.e. the suit property. However, my attention was invited to the contents of the deposition providing copies thereof and it appears that the so-called admission is not conclusive in nature. In spite of this aspect, it must be noted that even if the theory of partitions 30 years ago is not accepted, then the fact remains, as observed by the learned Trial Judge, that the defendant is co-sharer and, therefore, injunction cannot be granted against him so as to oust him from the suit property. It was further urged on behalf of the appellants that consolidation scheme was applied to the present property and his name was entered

into. However, the defendant has not objected to this aspect. In this regard it must be noted that mere keeping silence on the part of the defendant would not create any right in favour of the plaintiffs especially when the plaintiffs have failed to prove that they were in exclusive possession of the suit property.

6. The concurrent findings recorded by both the Courts below appear to be just and reasonable and, therefore, this Court in second appeal would not be justified in interfering the findings recorded by the last Court of fact, being the first appellate Court and especially when the circumstances on record show that when two inferences are possible, one drawn by the lower appellate Court would be binding on the High Court in second appeal and adopting any other approach would not be permissible.

In view of this position, the appeal is devoid of any merit and stands dismissed with no order as to costs. Consequently, Civil Application No. 1547 of 2005 also stands dismissed with no order as to costs.

.....